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SUPREME COURT U. S.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 20.

WILLIAM A. WRIGHT, COMPTROLLER-GENERAL,
PETITIONER,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY
AND ATLANTIC COAST LINE RAILROAD COMPANY,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING.

JOS. B. & BRYAN CUMMING,
KING, SPALDING & LITTLE,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

No. 20.

WILLIAM A. WRIGHT, Comptroller-General, PETITIONER, *vs.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY, RESPONDENTS.	On Writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit.

Decree Reversed, November 14, 1904.

PETITION FOR REHEARING.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Louisville and Nashville Railroad Company and the Atlantic Coast Line Railroad Company, respondents in the above entitled cause, come during the term at which the decision and judgment therein was rendered by this Honorable Court, and before the time fixed by the Rules thereof for the mandate in said cause to be issued and transmitted to the Court below, and respectfully pray this Honorable Court to grant a rehearing in said cause, upon the following grounds, to-wit:

I. Petitioners show to this Court that for more than twenty (20) years from and after the passage of the Constitution of Georgia of 1877, the several departments of government of the State of Georgia acquiesced in and acted upon the decision of the Supreme Court of Georgia that "stock in a railroad is really but "so many shares of its property, and that property is real estate for

"the most part, at least, and taxable by the State in which the "road is located."

64 Ga., 799.

No taxes were levied on any railroad stocks, domestic or foreign, until the Comptroller-General made this demand of petitioners' lessor in the year 1901.

Transcript, pps. 4, 12, 16.

The Comptroller-General is now claiming that State, County and municipal taxes for each year since the Constitution of 1877 was adopted, with double taxes assessed as a penalty, and interest thereon, are due and collectable. It is thus claimed that the amount due upon the stock of the Western Railway of Alabama under the recent decision of this Court will reach nearly, if not quite $1,000,000.

II. Petitioners respectfully insist that the decision of this Court is erroneous, upon the following ground:

Said decision states:

1st. That in the light of the decision of Kidd vs. Alabama, *188 U. S. 730,* it was not claimed that any denial of petitioner's rights under the Constitution of the United States was claimed.

Petitioners respectfully insist that such denial of right was claimed to exist.

The bill of complaint charged:

"That the attempted collection * * * of taxes upon these "shares of stock of the Western Railway of Alabama and the "enforcement of such pretended tax, will take their property "without due process of law, and denies to them the equal protec- "tion of the laws, in violation of the 14th Amendment to the "Constitution of the United States, and is therefore illegal and "void."

Transcript, p 15.

The brief of King, Spalding & Little for petitioners, claimed on page 27:

"If it (the Act of 1898) leaves the rule that shares are not "property, and then seeks to tax some; as the Legislature of "Georgia cannot classify property for taxation, or exempt it, it "discriminates,—it denies the equal protection of the laws to "the owner of certain shares of stock by taxing them, while leav-"ing the owners of other shares of stock untaxed."

"Traveller's Insurance Co. vs. Connecticut, 185 U. S., 364.

"County of Santa Clara vs. Railroad Cos., 18 Fed. R. 385, 394, 395, 399, 401."

(a) This Court has held in this cause that the Act of 1898 and the Constitution of Georgia have left railroad shares in companies chartered by Georgia untaxed, and that the same are untaxed. Therefore we insist that, as the Constitution of Georgia prohibits all classification, an attempt made by this Act of 1898, or by the Comptroller-General of the State, to tax the railroad shares held by petitioners, deprives the holder of these shares of the equal protection of the law. It is evident that so far as the stockholder is concerned railroad shares in Georgia railroads are as much, or more, personal property as are shares in foreign railroads. Not to be taxed, they must be regarded as not constituting a separate taxable property.

The case of Kidd vs. Alabama, 188 U. S. 730, sustained the taxation of foreign railroad shares in that State as against this Constitutional objection, on the ground of classification. The Georgia Constitution prohibits classification for purposes of taxation. Taxation of foreign railroad stock as personalty in the State while not taxing domestic railroad stock, which is also personalty, must rest either on classification or exemption.

That the State taxes the property of the corporation in one case, and cannot in the other, does not affect the value of the

stock as personalty—it is only the reason for making the classification or exemption.

We insist therefore that so far from this case defeating a claim that the taxation of these shares impairs the rights of these petitioners under the Fourteenth Amendment of the Constitution of the United States, as the Georgia Constitution guarantees that domestic railroad shares cannot be classified apart from foreign railroad shares for the purposes of taxation, it clinches the proposition that this effort to tax foreign shares is an attempt to classify and tax them as a separate class, which denies to these shares the equal protection of the highest law enacted by Georgia, to-wit, her Constitution.

(b) It was insisted in this case that the law of Georgia defining what constituted taxable property had established the rule that shares of stock were not property in the hands of the stockholders, separate and apart from the property of the corporation.

That is was lawful for the State to regard shares as not being such separate property.

It is settled that the Georgia legislature can not classify property for taxation.

It is therefore insisted—the law of Georgia, regarding railroad shares as not property apart from the corporate assets—that the attempt to tax railroad shares in an Alabama Railroad Company while not taxing any railroad shares of Georgia companies denies to the holders of such first class of shares the equal protection of the law which places all shares of stock in one class, with all the other property of the tax payer.

If stock is not taxable property in Georgia apart from the corporate assets, and if the payment of taxes on such assets complies with the Constitution of Georgia, then we insist that the *assets* and their *situs* is to be looked to, to determine where the property is taxable.

If railroad stock is not a separate taxable value from the railroad

property to attempt to tax shares in an Alabama railroad company is to tax the railroad and property situate in Alabama. This is contrary to Constitution of United States.

Mercantile Bank vs. New York, 121 U. S. 138, 162.

III. It is further respectfully insisted that a rehearing should be had, because the decision in this case recognizes the rule of Georgia as to taxation, as follows: "It is admitted that no such "double taxation is enforced with regard to corporations of which "the property is taxed within the State, and it would hardly be "contended that this wise moderation is unconstitutional. It "even has been thought that a similar Constitution forbade taxa- "tion of both capital and stock."

This recognizes that these shares are not personal property subject to taxation etc., in the shareholders hands.

It is submitted that under this rule the following part of the decision of this Court is erroneous:

"The difficulty with this argument is that the Georgia Constitu- "tion requires the taxation of all property subject to be taxed in "Georgia. And while it may be that the constitutional require- "ment is sufficiently complied with when the land and chattels "which give value to the stock pay a tax, without another tax on "the stock, there is much more difficulty in saying that the words "are satisfied if stock is left untaxed when the land and chattels "can not be reached. Probably the Constitution does not go "further than to require one tax on all attainable sources of value, "even if it permits more. Burke vs. Badlam, 57 Cal. 594, 601. "But it certainly seems intended to tax once at least all property "which can be come at in any way."

It is respectfully submitted that as the constitutional requirement is met and a tax on "all attainable sources of value" is levied, where corporate assets in Georgia are taxed; the necessary consequence is, that where the assets of a corporation are

located outside of the state, then the "sources of value" not being property in the State, the State in attempting to levy on foreign shares would under Georgia law be levying on sources of value outside of the State.

IV. A rehearing is further asked because the decision fails to enforce the Constitution of Georgia which forbids any classification of property for purpose of taxation.

It is further submitted that the decision thus affirming that railroad shares in Georgia Companies are not taxable as personal property of the owner while requiring the taxation of railroad shares in companies of other States, ignores:

1st. That shares of railroad stock, as personal property of value, in the hands of the shareholders are not the same *thing* of value as the capital stock of the corporation, but in law are a separate thing of value.

"A tax on shares of stockholders in a corporation is a different "thing from a tax on the corporation itself, or its stock, and may "be had irrespective of any taxation of the corporation, when no "contract relation forbids.

Cooley on Taxation (2nd Ed.) 231.

2nd. That it is only through the doctrine that the shares of stock both domestic and foreign are different property from the corporate assets that they are regarded as personal property in possession of the holder.

If *any* share of stock therefore is not taxable in Georgia in the holders hands, it must be because it is not property subject to be taxed in the territorial limits levying the tax, in the view of the Georgia law.

No share of stock is *property exempt* from taxation.

Therefore, where a railroad share in a Georgia Railroad is not taxed, it must be because in the eye of the law it is not *for taxable*

purposes a separate property of value in the hands of the stockder.

But if any railroad share is not personal property in Georgia subject to be taxed, certainly *no* railroad shares can be personal property in Georgia subject to be taxed.

If this is not so, it is only because all railroad shares being personal property in the hands of the shareholders separate from the corporate assets, the law has attempted to divide them into two classes and to exempt one class of such shares from taxation, to-wit, domestic shares. (This is the utmost the legislature can have tried to do by the questions Nos. 30 and 31 of the Tax Act of 1898.)

But the legislature is prohibited from classifying or exempting any property except that named in the Constitution, for purposes of taxation. All *taxable* property is put by the Constitution in one uniform, unalterable class.

Mayor &c. vs. Weed, 84 Ga., 683, 686;
Ga. B. & L. Asso. vs. Savannah, 109 Ga., 63, 67, 68;
Atlanta Nat'l Asso. vs. Stewart, 109 Ga., 80, 97.

V. Said rehearing should be granted because an effect is given to section 3070 of the Civil Code of Georgia (classifying shares of stock as personalty), as making foreign shares of stock personal property subject to taxation, while domestic shares are not taxed in any way as personal property. We insist this is error because said section relates alone to shares in companies incorporated by Georgia, holding lands, and defines the interest thus created as personalty.

Yet, "it is admitted that no such double taxation is enforced "with regard to corporations of which the property is taxed within "the State."

Yet unless railroad shares are not property subject to taxation, they are personalty which is without any exemption.

VI. We respectfully insist that said decision is also in error in giving any effect to the Act of 1884-5, Sec. 2, p. 30, as declaring foreign railroad shares to be property taxable in Georgia. This Act, if of force, does not make any share of stock representing a fixed property, within or without the State, taxable. This is evidenced by an inspection of the whole Act.

1st. It clearly and expressly puts all stocks in corporations, domestic and foreign, on the same plane.

Section 1 of the same Act requires the return of "the amount of capital invested in stocks of companies other than such companies as are required to be *returned by the Presidents or their Agents, either to the Tax Receiver or Comptroller-General.*"

This excludes Railroad Corporations.

Then follows the Section II relied on.

Clearly this means in all corporations other than those returning for taxation the property which represents their capital.

This is evidenced by the fact that no department of the government made any effort to change the settled rule of taxation as to stocks in domestic or foreign corporations, or to collect taxes thereon. Executive action thus construes the law.

Miller vs. Wilson, Tax. Rec., 60 Ga., 505.

If it be assumed that this law intended to tax foreign railroad shares, clearly its first section intended to leave domestic shares untaxed.

Hence the effort was to classify railroad shares (in the hands of the holders), and it was illegal and unconstitutional.

This is likewise true of the Tax Act of 1898, if it attempts to tax foreign shares alone.

That the Act of 1884-5 is superseded by Code of 1895. See

Barnes vs. Carter, 120 Ga., 895, 897.

VII. A rehearing is also asked because the decision does not follow the decisions of the Courts of the State of Georgia fixing the status of shares of stock in railroad companies as taxable property.

The State of Georgia by decisions of her courts as far back as 1832 held that stock was not a thing of value to be taxed apart from the property it represented.

Bank vs. Savannah, Dudley's Rep. 130.

Georgia does not follow closely the rule *mobilia personam sequuntur*, in fixing the *situs* of intangible properties for taxation. Until the legislature enacted otherwise even debts had *situs* for taxable purposes where the debtor, and not where the creditor, resided. It took express statute to change this.

Bridges vs, Mayor &c., of Griffin, 33 Ga., 113, 115.
Armour & Co. vs. Augusta, 118 Ga., 552.

The decision of the supreme court of Georgia in the case of Wright, Comptroller-General, v. Southwestern Railroad Co., 64 Ga. 783, 799, was a solemn decision by a full bench on the status of railroad stock as property subject to taxation in Georgia.

Railroad stock in Georgia may be divided into three classes. First: railroad shares in the hands of third persons in companies having no exemption from taxation. Second: railroad shares in companies having exemption from taxation upon their properties generally, but taxed upon earnings instead. Third: railroad shares in railroad companies without the State of Georgia.

No question was made in the case (none has ever been made since), that railroad shares in Georgia corporations whose property was taxed, were not property subject to taxation.

But it was insisted:

(a) That where railroad companies did not pay taxes upon their property, but were exempt from taxation except a certain per cent. on income, the shares were taxable property in the hands of the holders.

(b) That where a corporation having such exemption, had acquired a part of its own shares, they were a part of its taxable property to be returned as such.

(c) That shares in foreign railroads held by Georgia corporations and individuals were taxable as property in Georgia.

The supreme court, deciding these questions, ruled:

"Stock in the company's own road, held by itself, or in other "roads in this State, whose charters limit or exempt taxation "thereon, is not liable; and stock held by the company in railroads "without the limits of this State is not taxable here. Stock in a "railroad is really but so many shares of its property, and that "property is real estate, for the most part, at least, and taxable "by the State in which the road is located."

The adjudication is not in any sense dicta, but the decision of the full bench on the exact point at issue. It is not dealing with *exemption*, but with the *status* and *situs* of railroad shares for taxation.

VIII. It is submitted that there should be a rehearing in this case because the decision rendered is in error as to the present status of the above case as controlling authority in Georgia.

There is no later decision which in any way attacks or questions the judgment of the supreme court that stock in foreign railroad corporations is not within the meaning of the Constitution and Laws of Georgia, property within the State subject to taxation, but that it is but so many shares of the railroad's property and taxable by the State in which the road lies.

The case of the Georgia State Building & Loan Association vs. Savannah, 109 Ga. 63, in no way deals with the above question. In that case the question involved was whether a building and loan association of Georgia must return for taxation its assets at their true market value, or whether it could return, under a Legislative Act so permitting, the market value of the stock of such association upon which no advance had been made or money borrowed, such tax to be in lieu of all other taxes and licenses whether, state, county, or municipal, against said corporation. The question of the taxability of stock in the hands of the shareholder was not involved, but the sole question was whether or not the Legislature could exempt the assets of the corporation from ad valorem taxation and substitute in lieu thereof the above measure. The court held that this could not be done. It said, "in other "words, by this Act the General Assembly of Georgia undertook "to fix an arbitrary basis of taxation against these associations "which should stand in the place of any other property tax, evi- "dently upon the idea that the taxing power had a right, in rais- "ing the revenue necessary for the support of the government, to "classify subjects of taxation. This our Constitution forbids when "applied to property."

So far from repudiating the proposition that shares of stock need not be regarded as separate property for the purpose of taxation, the decision provides:

"There are, in general, four methods of taxing corporate inter- "ests. These are—1st, by a tax on the franchise; 2nd, on the "capital stock; 3rd, on the real estate and personal property of "the corporation; 4th, by the taxing of the shares of stock in the "hands of the stockholders. * * * It is not incumbent on the "taxing power to impose a tax on each, but it may do so, and while "as a rule double taxation is not favored, whether it will be im- "posed or not rests with the taxing power—originally the legis- "lature."

If the legislature has undertaken to tax foreign railroad shares while leaving domestic shares untaxed, this decision supports the

proposition that where the State does not tax railroad shares as one class, it cannot tax railroad shares at all. The language is:

"If it was the intention of the General Assembly to limit the "power of the municipal authorities to tax the property of the "corporations referred to, then a serious question would arise as "to the power of the municipality to tax similar property of other "corporations and persons under the general legal duty to tax "all property alike."

109 Ga., 69.

In the present case it is conceded and decided that railroad shares in Georgia corporations are not taxed, and, classification being prohibited, we insist that an attempt to tax railroad shares in foreign corporations is unconstitutional.

The legislature has never attempted to make *all* railroad shares personalty subject to taxation. To hold therefore that any attempt it might make to depart from the rule that foreign railroad shares are non-taxable would have the effect to make all shares taxable, would be to make the legislature do what it expressly did not intend to do. An act cannot be held to have this effect in order to save it.

Virginia Coupon Cases, 114 U. S. 269, 305.

IX. A rehearing is further prayed on the ground that this decision denies to the decisions of the Supreme Court of Georgia fixing the situs of shares of capital stock for purposes of taxation, their proper effect as a rule of property in said State.

It is insisted that these decisions have fixed the situs of these shares out of the State, and not in Georgia.

That personalty need not have the same situs for purposes of taxation with its owner is well recognized.

This Court has recognized this in regard to shares of stock in National Banks.

"Shares of stock in National Banks are personal property * * " * * * * * * but the law which creates them may separate them "from the person of their owner for purposes of taxation, and "give them a situs of their own. This has been done."

Tappan vs. Bank, 19 Wall. 490, 500.

The State can equally do this through a rule of property established by the Courts.

"The same considerations apply to what is called exemption "from taxation of shares of stock of corporations created by other "States and owned by citizens of New York. * * * * * * * * "It is not pretended, however, that this exemption is based upon "the mere will of the legislature of the State. The Courts of New "York hold that they are not the proper subjects of taxation in "the State of New York, because they have no situs within the "territory for that purpose. *White vs. Commissioners of Taxes, "23 N. Y. 224. People ex rel Trowbridge vs. the Commissioners, "4 Hun. 595.* The objection would be equally good if made to the "non-taxation of real estate owned by citizens of New York, but "not within its limits."

Mercantile Bank vs. New York, 121 U. S. 138, 162.

The State of Georgia has not followed the rule that personal property has the same situs as its owner for purposes of taxation.

In determining where taxes on notes should be collected, the Court held that the owner should be taxed not where he resided, but where his debtor lived, saying:

"The fact that the owner of these debts resides in the city and "has the notes there, does not alter the fact. The notes are but "the evidences of the debt, while the debt itself is out of the city, "as a man's title deeds or bill of sale are the evidences of the "owner's right of property in his land and negroes; and it would "never be thought that land and negroes out of the City would "be liable to city taxes because the owner resided in the city and "kept his title deeds there."

Bridges vs. Mayor &c. of Griffin, 33 Ga. 113, 115.

Notes and other evidences of debt are now taxable when the creditor resides only by express statute.

Political Code, Section 776.

But the statute does not include stocks. Georgia, in order to avoid the inequality produced by one State taxing all the property rendering stock valuable, and another State taxing the stock at full value, has adopted the rule that for purposes of taxation stock in foreign corporations has no taxable situs in Georgia.

Wright vs. Railroad Co. 64 Ga., 783, 799.

This case has never been questioned since it was first decided. It has been twice mentioned by the Supreme Court of Georgia—once where it went again to the Supreme Court of Georgia, and the Supreme Court said that it was in all things affirmed.

Wright vs. Railroad Co. 68 Ga., 811.

Again, where the question of situs of stock was before the Supreme Court, and the Court quoted the decision in the 64 Ga., fixing the situs of foreign shares for taxable purposes out of the State, without any qualification.

People's Bank vs. Cleveland, 117 Ga., 908, 913, 915.

In no case has there ever been an intimation that shares in foreign railroad companies had any situs within the State for purposes of taxation.

X. A rehearing is also asked because this decision formally rendered by the Supreme Court of Georgia has the force and effect of a legislative act until formally reversed, as provided by law.

Heard & Russell vs. Potter, 59 Ga., 25, 54.

"A decision rendered by the Supreme Court prior to the first "day of January, 1897, and concurred in by three judges or

"justices, cannot be reversed or materially changed, except by the "concurrence of at least five justices, and then after argument "had, in which the decision by permission of the court is ex- "pressly questioned and reviewed, and after such argument the "court in its decision shall state distinctly whether it affirms, re- "verses or changes such decision."

Code of 1895, Sec. 5588, as amended by Georgia Acts of 1896, page 42.
Van Epps' Supplement to Code of Georgia, Sec. 6211

The only occasion on which this decision has been under review by the Supreme Court since 1897 is in the case of People's Bank vs. Cleveland, 117 Ga., above cited, and it is therein neither reversed nor modified, but quoted with apparently entire approval.

It is urged that this ruling is binding on the Federal Courts.

Bardon vs. Land Co. 157 U. S. 327, 351.

For which several reasons petitioners pray that the judgment heretofore rendered in this cause be set aside and a rehearing ordered and such other proceedings had as to justice shall appertain.

And petitioners will ever pray, &c.

Louisville and Nashville Railroad Company,

Atlantic Coast Line Railroad Company,

By their Solicitors,

JOSEPH B. CUMMING.

ALEX. C. KING.

We hereby certify that we have examined the foregoing petition for a rehearing and that in our opinion the same is well founded, and that the case is one in which the prayer of the petitioners should be granted by this Court.

Jos, B. Cumming.

Alex. C. King.
Of Counsel for Petitioners.

APPENDIX.

OPINION OF THE COURT.

SUPREME COURT OF THE UNITED STATES.

No. 20—October Term, 1904.

WILLIAM A. WRIGHT, Comptroller-General, PETITIONER,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY and THE ATLANTIC COAST LINE COMPANY.

On Writ of Certiorari to The United States Circuit Court of Appeals for the Fifth Circuit.

(November 14, 1904.)

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case comes here on certiorari to the Circuit Court of Appeals, that court having affirmed, *per curiam* a decree of the Circuit Court enjoining the Comptroller-General of Georgia from collecting a tax for the year 1900. 116 Fed. Rep. 669. 117 Fed. Rep. 1007. In view of the conclusion to which we have been driven, it is enough to say that the question presented is whether shares of stock in the Western Railway of Alabama, an Alabama corporation, held by the Georgia Railroad and Banking Company, a Georgia corporation, are taxable as property of the latter by the State of Georgia under its Constitution and statutes. The defendants in error, the plaintiffs below, are lessees of the Georgia corporation and are bound to reimburse the latter for the tax, if it has to be paid. Taking into account the decision in Kidd v. Alabama, 188 U. S. 730, the power of the State to tax the shares is not denied, so far as the Constitution of the United States is concerned, but it is argued that the State has not attempted to use that power by its present Constitution and laws.

The Constitution of Georgia provides that "all taxation "shall be uniform upon the same class of subjects, and ad

"valorem on all property subject to be taxed within the ter- "ritorial limits of the authority levying the tax and shall be "levied and collected under general laws." Code, 1895, Sec. 5883. The words "within the territorial limits" plainly qualify "subject to be taxed." The Constitution further makes void all laws exempting property from taxation other than the property therein enumerated, which does not include this stock. Sec. 5886. Following these requirements the General Tax Act for 1899 and 1900, Laws of 1898, No. 150, Secs. 1, 2, p. 22, authorizes a tax on all of the taxable property of the State.

The natural inference from the foregoing language is that the Comptroller General was bound to collect this tax. It is true that it was said, in a case decided before the date of the present Constitution, that stock in railroads outside the State was not taxable in Georgia, the reason offered being that stock is really but so many shares of the railroad's property, and that that property is real estate, for the most part at least, and taxable by the State in which the road lies. Wright v. Southwestern Railroad, 64 Ga., 788, 799. This reason is shown by later decisions to be an insufficient ground for a claim of constitutional right, and the language of the case probably does not represent adequately the present opinion of the Supreme Court, although the passages is cited in the latter cases of the two following cases: Georgia State Building and Loan Association v. Savannah, 109 Ga., 63, 69. The Peoples National Bank, Cleveland, 117 Ga., 903, 913, 915.

If we look to the construction adopted by the Legislature there is no doubt as to that. The Code after defining personalty as property movable in its nature, continues "stocks re- "presenting shares in an incorporated company holding lands, "or a franchise in or over lands, are personalty."—Sec. 3070. The act of 1884-1885, touching returns of property for taxation, No. 457, sec. 2, p. 30, enacted in terms "that personal "property shall be construed, for purposes of taxation, to in- "clude.....all stocks and securities, whether in corpora- "tions within this State or in other States, owned by citizens "of this State, unless exempt," &c. It is argued on one side and denied on the other that this section was repealed by the

Code, but whether it was or not, it equally may be invoked for the purpose of interpretation at least. We do not understand and cannot believe that the Supreme Court of the State would deny the power of the Legislature under the present Constitution to tax stock.

The argument against the tax is that the Constitution of Georgia is satisfied if all the lands and goods in the State are taxed once, and that the appearance of the same capital in two forms technically distinct ought not to be laid hold of as an excuse for two taxes. It is admitted that no such double taxation is enforced with regard to corporations, of which the property is taxed, within the State, and it hardly would be contended that this wise moderation is unconstitutional. It even has been thought that a similar constitution forbade taxation of both capital and stock. Burke v. Badlam, 57 Cal. 594, 601. But, from the point of view of the tax-payer, it does not matter whether all of his double taxation is done in one State or half in one and half in another. He suffers the same injustice. And as manifestedly the clearest right to tax belongs to the State where the railroad has its track, every principle of justice and patriotism would require the same abstinence from taxing stocks of the railroads of neighboring States that is practiced with regard to those of the taxing State—in this case Georgia—itself.

The difficulty with this argument is that the Georgia Constitution requires the taxation of all property subject to be taxed in Georgia. And while it may be that the constitutional requirement is sufficiently complied with when the land and chattels which give value to the stock pay a tax, without another tax on the stock, there is much more difficulty in saying that the words are satisfied if the stock is left untaxed when the land and chattels cannot be reached. Probably the constitution does not go further than to require one tax on all attainable sources of value, even if it permits more. Burke v. Badlam, 57 Cal., 594, 601. But it certainly seems intended to tax once at least all property which can be come at in any way. San Francisco v. Fry, 68 Cal., 470. A tax in another State is no tax for the purpose of the State of Georgia, Kidd v. Alabama, 188 U. S., 730, 732. Dwight v. Boston, 12 Allen

816. Steward v. Rising Sun, 79 Indiana, 851. Dyer v. Osborne 11 R. I., 321. McKeen v. Northampton, 49 Pa. St., 519.

Putting the case at the lowest, the above cited section of the Constitution was adopted in the interest of the State as a tax collector, and authorizes, if it does not require, a tax on the stock. In pursuance of the Constitution, the law of 1898, under which this tax is demanded, contains the following:

"In addition to the questions now propounded to taxpayers "by the tax receivers, questions shall be framed by the Comp- "troller-General to reach all property upon which a tax is "imposed by this Act, and especially the following questions: "— — — — — — — — Thirtieth—How many shares of stock "did you own on the day fixed for the return of property for "taxation issued by corporations located without this State? "Thirty-first—What was the gross nominal value thereof? "Thirty-second—What was the fair market value thereof?" Laws of 1898, No. 150, Sec. 16, p. 86.

This plainly contemplates that the mandate of the Constitution shall be carried out, and in view of Sections 1, 2, of the same Act, referred to above, and of the facts that legislation could not make the requirement to tax more explicit, and that the Constitution seems to be regarded by the Supreme Court of the State as self-executing. Georgia State Building and Loan Association v. Savannah, 109 Ga. 63, we think it impossible to escape from the words. The distinction intended between stock in corporations of which the property is taxed by the State, and that in corporations otherwise untaxed is emphasized by the thirty-third question—"How "many shares of stock did you own.....issued by "corporations within this State, the capital stock of which or "the property of which is not returned by such corporation "for taxation?" We think the distinction consistent with the Constitution, if not required by it as held in Burke v. Badlam, cited above.

Decree Reversed.

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DEC 23 1904
SUPREME COURT U. S.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 20.

WILLIAM A. WRIGHT, Comptroller General,
Petitioner,

AGAINST

LOUISVILLE & NASHVILLE RAILROAD COMPANY and ATLANTIC COAST LINE RAILROAD COMPANY,
Respondents.

Memorandum for the Central Trust Company of New York, Trustee, in support of petition for re-hearing.

The Central Trust Company of New York is the trustee of two mortgages, viz: one made by the Central Railroad & Banking Company of Georgia, known as its collateral trust mortgage, securing $5,000,000 of bonds, and the other a mortgage of the Central of Georgia Railway Company, known as its second preferred income mortgage, securing $7,000,000 of bonds. The first mentioned mortgage constitutes a first lien upon fifteen thousand shares of stock of the Western Railway of Alabama, and the other mortgage is a junior lien upon said shares. The certificates are in possession of the trustee. They were formerly the property of the Central Railroad &

Banking Company of Georgia, and are now the property of the Central of Georgia Railway Company, subject to the said mortgages.

The effect of the decision rendered in this case upon the interests of the bondholders is serious, and if it is carried into effect the holders of the second preferred income bonds will undoubtedly sustain severe loss. For this reason the Central Trust Company of New York has asked permission to submit a few considerations in aid of the petition for rehearing, and this has been kindly accorded by the CHIEF JUSTICE.

The principal reason assigned for the reversal of the judgment of the lower courts is that the Constitution of Georgia, adopted since the decision of *Wright vs. Southwestern Railroad* (64 Ga. 783) provides that " all taxation shall be uniform upon the same class or subjects and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws "; and that the Legislature of Georgia by certain general Acts has in substance provided that shares of stock are taxable in the hands of holders thereof, such shares being personalty and hence subject to taxation.

It is respectfully submitted that this view assumes what is not the precise fact; that is to say, it assumes that shares of stock in the hands of holders are necessarily personalty subject to taxation.

The property of a corporation is called its capital. The capital of a corporation is the same as the capital of an individual, and each is subject to the same taxation. It is not the paper certificates of shares of capital in a corporation that are taxed; they merely represent and evidence the distributive portions of the capital or substance of the company which should go to the different share owners upon the dissolution of the company, and it is this capital or substance which is taxed. The actual property, not the paper certificates representing it, is what is taxed. To tax the property and then the paper certificates representing it would be taxing the same property twice. It would be the same as taxing so many acres of land and then taxing the title deeds of it. (See

People ex rel. Brooklyn Traction Co. vs. Board of Assessors, 61 N. Y. State Reporter, 480.)

The Supreme Court of Georgia accordingly held in the case above referred to (64 Ga. 783) that stock in a railroad is really but so many shares of its property, and that property is real estate for the most part at least and taxable by the State in which the road is located; and that therefore stock held by a Georgia Company in railroads without the limits of the State was not taxable in Georgia.

There is nothing in the Georgia Constitution of 1877 or in the acts of the Legislature of Georgia which does away with the principle thus enunciated.

The decision in the case at bar further proceeds upon the theory that while it may be that shares of Georgia corporations are not taxable as personalty because the property of the corporation itself is subject to taxation, yet shares of stock of corporations of other States are taxable because the corporation pays no tax in Georgia. But the courts have not hitherto founded their decisions on this subject upon any such distinction.

Where it is sought to tax corporate shares in the hands of the holders, the courts have not placed their decisions exempting such shares from taxation upon the ground that the corporation paid taxes in the State where it was sought to tax the shares, but on the ground that the corporation paid taxes somewhere, namely, in the country of its domicile.

In New York the statute provides that the owner of stock of a corporation liable to taxation on its capital shall not be taxed as an individual for such stock. The courts of New York have held that this exemption applies to stocks of foreign corporations, as well as of domestic corporations, and that residents of New York owning shares of stock in a corporation of a foreign State are not subject to be assessed and taxed thereon in New York, *because the presumption is that such corporations are taxed upon their capital in the home States.*

In *People ex rel. Trowbridge vs. Commrs. of Taxes*, 4 Hun 595 (affirmed, 62 N Y 630) the court by DAVIS, Presiding Justice, says:

"Such corporations [that is to say, corporations of other

States] are taxable, and we must presume in the absence of proof that taxes in their respective home States are duly assessed and collected upon their capital stock or property. The stocks in such corporations held by individuals here are simply representatives of capital or property employed in business in other States, the title of which is vested in and controlled by the artificial person created and by residing in such States. They represent an interest which is or may become a membership in the corporation, and evidence of a right to participate in divided profit and in the ultimate dividend of a surplus after the payment of all debts and obligations of the corporation. The stock certificates are not themselves the property, but are evidences of the rights just mentioned to be possessed, enjoyed and enforced under and in conformity with the laws of the State which created the body corporate."

If this be a correct statement of the law, as we respectfully submit it is, then the rule that shares of stock will not be taxed in the hands of the owners unless the Legislature has expressly so declared, is applicable to stocks of foreign corporations as well as of domestic corporations. The case last cited is approved in *People vs. Pacific Mail S. S. Co. v. Commrs. of Taxes*, 5 Hun, 200; affirmed, 64 N. Y. 541, and *People ex rel. Brown vs. O'Rourke*, 35 App. Div. 583, p. 589.

It is conceded in the record and admitted by the opinion that no such double taxation is enforced with regard to Georgia corporations, and it is said that "the argument against the tax is that the Constitution of Georgia is satisfied if all the lands and goods in the State are taxed once, and that the appearance of the same capital in two forms technically distinct ought not to be laid hold of as an excuse for two taxes."

It is respectfully submitted that this does not accurately state the argument against the tax. The argument is that neither the Constitution of Georgia nor the acts of its Legislature contemplate the taxation of shares of stock of railroad companies either of Georgia or of other States.

It will be observed that if the decision in the present case shall stand, the result will be that the taxing officers of the State of Georgia will possess a power which the Legislature itself does not possess. Logically, if shares of stock of a for-

eign corporation are taxable in Georgia, shares of stock of domestic corporations must also be taxed, for the Constitution of Georgia forbids any classification or exemption. To tax shares of a foreign corporation and to refuse to tax shares of a domestic corporation is manifestly a classification of personal property for purposes of taxation.

It is unnecessary to repeat or to present in another form the various considerations set forth in the petition for a rehearing. In view of the importance of the case and the large amounts involved, it is respectfully submitted that no injustice will be done by according an opportunity to reargue the case.

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